

Scott Brown has moved for postconviction relief. Previously, his motion for reduction of sentence was denied. He makes these claims: (1) prosecutorial misconduct for mentioning at sentencing two unrelated gun charges for which he had not been convicted; (2) ineffective assistance of counsel at sentencing for not objecting to the prosecutor's remarks and not making the State abide by the sentencing recommendation in the plea agreement; and (3) ineffective assistance of counsel for not insisting on immediate sentencing and a sentence as the State recommended.

On May 7, 2008, Brown pled guilty to attempted arson in the first degree¹ and possession of an explosive device.² He had been indicted for six counts of attempted murder first degree, possession of a deadly weapon during the commission of a felony (a molotov cocktail), and conspiracy second degree.

In the Plea Agreement, the State requested immediate sentencing. The State's sentencing recommendation in the Plea Agreement was: (1) thirty months at Level 5, suspended for eighteen months for Level 2 probation on the arson charge, (2) two years at Level 5, suspended for eighteen months Level 2 probation on the explosive device charge.

The Court, however, did not sentence immediately but chose to order a pre-sentence investigation. One was done and sentencing proceeded on July 18, 2008. The Court

¹ 11 *Del. C.* § 803.

² 11 *Del. C.* § 1338.

sentenced Brown to fifteen years suspended after thirty months, followed by six months of work release, followed by three years Level 3 probation on the attempted arson charge.³ On the explosive devices charge, Brown's sentence was eight years in jail, suspended for two years of Level 3 probation.

Discussion

Before the Court can consider the defendant's claims, it must determine if there is any procedural impediment to doing so.⁴ There is none. It is important to note that, by coincidence only, this judge accepted Brown's plea and was the sentencing judge.

Two of Brown's claims for relief are inter-related. They involve the lack of immediate sentencing. One claim is that there was prosecutorial misconduct by not insisting on immediate sentencing. The "flip side" of this claim is that his counsel at the time of the plea was ineffective for not insisting on immediate sentencing.

Both aspects of this claim lack merit. It is the Court which decides whether a defendant is to be sentenced at the time a guilty plea is entered or whether a pre-sentence investigation is warranted.⁵ This judge, looking at all of the charges in the indictment and the seriousness of the charges to which Brown pled guilty decided that a pre-sentence

³ As the sentence order notes, the third year of probation was imposed under 11 *Del. C.* § 4333(d)(2) for public safety reasons.

⁴ *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

⁵ Super. Ct. Crim. R. 32(c).

investigation was necessary. That decision is within the sound discretion of the judge accepting the plea not the prosecutor and not defense counsel.⁶ In addition, the Court is not bound by the State's request for either immediate sentencing or for a pre-sentence investigation.

In short, there was no prosecutorial misconduct and no ineffective assistance of counsel regarding the issue of immediate sentencing versus a pre-sentence investigation.

Brown seeks a new sentencing hearing at which time, he asserts, the State will be bound to make the sentencing recommendation it stated in the Plea Agreement. This could cure another act of claimed prosecutorial misconduct. What Brown fails to comprehend, however, is that the sentencing judge is not bound by the recommendation. The State is bound to offer the recommendation but the Court is not bound to accept it. Further, when he entered his plea, the Court told him that the sentencing judge is not bound by the recommendation. He knew when he entered his guilty plea that he could receive up to fifteen years in jail on the attempted arson charge.

Even if the State made a recommendation at sentencing beyond what it had agreed to in the Plea Agreement, that had no affect on his sentence. The issue for the Court was the severity of his charges and his conduct. The actual sentence was within, though at the top, of the SENTAC presumptive sentence.

⁶ See *Myrks v. State*, 590 A.2d 503, 1991 WL 57117 at *1, (Del. 1991)(TABLE).

Under the circumstances also, there can be no ineffective assistance of counsel for not objecting to the State going beyond the Plea Agreement recommendation, assuming the State did so at sentencing. This judge was not influenced by it, if it did so.

Brown claims ineffective assistance of counsel for not objecting to the prosecutor's remarks at sentencing about pending gun charges against Brown. This he asserts was due to the fact that the Public Defender who represented him at sentencing differed from the Public Defender who represented him when he entered his plea. That he had different counsel is correct.

Assuming the State mentioned pending charges, Brown would be incorrect that pending charges influenced this judge in any way. At the time of sentencing, he was presumed innocent of those charges. They played no role in his sentence.

In sum, assuming the prosecutor mentioned the pending charges and assuming defense counsel failed to object, there still can be no ineffective assistance of counsel. Brown suffered no prejudice as the Court was uninfluenced by pending charges in the sentence imposed.

Conclusion

For the reasons stated herein, defendant and Scott Brown's motion for postconviction relief is DENIED.

IT IS SO ORDERED.

J.